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No. 05-1120

IN THE

Supreme Court of the United States

COMMONWEALTH OF MASSACHUSETTS, ET AL.,
Petitioners,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, ET AL.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF FOR RESPONDENT UTILITY AIR REGULATORY GROUP

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QUESTIONS PRESENTED

1. Whether, in this challenge to the Environmental Protection Agency's ("EPA") denial of a petition for rulemaking on greenhouse gas emissions from new motor vehicles under section 202(a)(1) of the Clean Air Act, 42 U.S.C. 7521(a)(1), petitioners established standing, *i.e.*, that they suffer concrete, particularized, and imminent injury that was caused by EPA's denial of the petition and that would be redressed by a judicial decision in their favor.

2. Whether it was within EPA's discretion to deny the petition for rulemaking based on scientific uncertainty and other policy factors.

3. Whether EPA's determination that it does not have authority under the Clean Air Act to regulate new motor vehicles' greenhouse gas emissions comported with and reflected a reasonable interpretation of that statute.

PARTIES TO THE PROCEEDING

The parties are listed in the Brief for the Petitioners. Pursuant to Rule 29.6, Respondent Utility Air Regulatory Group filed a disclosure statement in its brief in opposition to the petition for a writ of certiorari, and that statement remains accurate.

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BRIEF FOR RESPONDENT UTILITY AIR REGULATORY GROUP

STATEMENT OF THE CASE

This case involves review of the U.S. Environmental Protection Agency's ("EPA" or "Agency") denial of a petition for rulemaking asking it to regulate greenhouse gas emissions from new motor vehicles under section 202(a)(1) of the Clean Air Act ("CAA" or "Act"), 42 U.S.C. 7521(a)(1), to address global climate change. Petition for Rulemaking and Collateral Relief Seeking the Regulation of Greenhouse Gas Emissions from New Motor Vehicles Under § 202 of the Clean Air Act (Oct. 20, 1999), Joint Appendix ("J.A.") 5; EPA, Control of Emissions From New Highway Vehicles and Engines, Notice of denial of petition for rulemaking, Appendix to Cert. Pet. ("Pet App.") A59. Petitioners sought review of EPA's denial in the United States Court of Appeals for the District of Columbia Circuit. In a divided opinion, that court held that EPA properly exercised its discretion in denying the petition. Pet. App. A1 (Randolph, J.); *id.* at A16 (Sentelle, J., concurring in the judgment).

I. The Petition For Rulemaking

The International Center for Technology Assessment ("ICTA") and 18 other entities[1] filed the petition for rulemaking in 1999 under the Administrative Procedure Act ("APA"),[2] asking EPA to regulate emissions of carbon dioxide ("CO_2") and three other greenhouse gases (methane, ni-

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[1] The entities that filed the petition for rulemaking are listed at J.A. 7-11. They include four of the petitioners in this case: ICTA, Environmental Advocates, Friends of the Earth, and Greenpeace.

[2] J.A. 6 (citing 5 U.S.C. 553(e)).

trous oxide, and hydrofluorocarbons) from new motor vehicles and new motor vehicle engines under section 202(a)(1) of the Act for the purpose of addressing global climate change. That provision states:

> The Administrator [of EPA] shall by regulation prescribe (and from time to time revise) in accordance with the provisions of this section, standards applicable to the emission of any air pollutant from any class or classes of new motor vehicles or new motor vehicle engines, which in his judgment cause, or contribute to, air pollution which may reasonably be anticipated to endanger public health or welfare.

42 U.S.C. 7521(a)(1). After setting out their views of the health and welfare consequences of greenhouse gases in the global atmosphere, the petitioners argued that "[u]nder the CAA, the Administrator [of EPA] is permitted to make a precautionary decision to regulate pollutants in order to protect public health and welfare" and that "[i]n addition . . ., the Administrator has a mandatory duty to regulate greenhouse gas emissions from new motor vehicles under § 202(a)(1) of the CAA." J.A. 15.

Addressing their "mandatory duty" claim, the petitioners claimed the Administrator already had "determined that: (1) the emission of a greenhouse gas is an 'air pollutant' and is emitted from new motor vehicles; and (2) the emission causes or contributes to air pollution which may reasonably be anticipated to endanger public health or welfare." J.A. 16 (emphases omitted); see *id.* at 18 (asserting EPA already had determined "that CO_2 meets the definition [of "air pollutant"] contained in [CAA] § 302(g) [42 U.S.C. 7602(g)]") (citing a memorandum and congressional testimony by EPA general

counsels).[3] In addition, in light of what they characterized as EPA's "authority to use precaution when regulating air pollutants," *id.* at 42 (citing *Ethyl Corp.* v. *EPA*, 541 F.2d 1 (D.C. Cir. 1976) (*en banc*) (Wright, J.)), the petitioners urged EPA to conduct rulemaking even if it "believe[d] that there are scientific uncertainties regarding the actual impacts from global warming." *Id.* at 41-42.

II. EPA's Response To The Petition For Rulemaking

EPA solicited public comment on the petition for rulemaking. 66 Fed. Reg. 7486 (2001). Thereafter, certain petitioners filed suit in the U.S. District Court for the District of Columbia to enforce their APA right, see 5 U.S.C. 555(b), (e), to a reasonably timely response to the petition. *International Center for Technology Assessment* v. *Whitman*, No. 02-2376 (D.D.C., filed Dec. 5, 2002). EPA's denial of the petition at issue here mooted that case. See *id.*, Order of Sept. 24, 2003 (dismissing case as moot on parties' joint motion); Pet. App. A59 (EPA notice of denial of petition for rulemaking).

EPA set forth three grounds for its denial of the petition. First, based on the Act's language and legislative history, other statutes, congressional decisions, and statutory interpretation principles underlying *FDA* v. *Brown & Williamson Tobacco Corp.*, 529 U.S. 120 (2000), EPA determined it lacked authority under the CAA to regulate greenhouse gas

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[3] Petitioners supported their assertion that the Administrator already had determined that section 202(a)(1)'s criteria for regulation were met for these gases by relying on statements from an EPA website discussing various possible effects of global warming generally, see, *e.g.*, J.A. 22, 26, 29, 30, 31, 32, 34, non-EPA sources, such as a report of the United Nations Intergovernmental Panel on Climate Change ("IPCC"), see *id.* at 22-23, 25-28, 33-35, an article in a medical journal, see *id.* at 24-25, and a physician's statement, see *id.* at 33.

emissions for the purpose of addressing global climate change. Pet. App. A69-A79. The Agency said that "[i]n light of Congress' attention to the issue of global climate change, and the absence of any direct or even indirect indication that Congress intended to authorize regulation under the CAA to address global climate change, it is unreasonable to conclude that the CAA provides the Agency with such authority." *Id.* at A78.

Second, EPA determined that even if the CAA authorized it to regulate greenhouse gas emissions to address global climate change, granting the rulemaking petition would impermissibly conflict with Title V of the Energy Policy and Conservation Act ("EPCA"), 49 U.S.C. 32901-32919, which gives sole authority to set motor vehicle fuel economy standards to the U.S. Department of Transportation. Pet. App. A79-A80. EPA found that "[a]t present, the only practical way to reduce tailpipe emissions of CO_2 [the most prevalent greenhouse gas] is to improve fuel economy." *Id.* at A79. EPA concluded that "any EPA effort to set CO_2 tailpipe standards under the CAA would either abrogate EPCA's regime (if the standards were effectively more stringent than the applicable [fuel economy] standard) or be meaningless (if they were effectively less stringent)." *Id.* at A80.

Third, EPA determined that, assuming *arguendo* that it had authority to regulate greenhouse gas emissions to address global climate change, section 202(a)(1) of the CAA—the provision at issue—gives EPA's Administrator discretion to determine "in his judgment" whether, based on the facts before the Agency, the emissions in question "may reasonably be anticipated to endanger public health or welfare." 42 U.S.C. 7521(a)(1). EPA observed that the Administrator had never made a determination under the CAA that greenhouse gas emissions may reasonably be anticipated to endanger public health or welfare and that the timing of any endan-

germent determination is within his discretion. Pet. App. A80-A81. EPA thus determined that, contrary to the petitioners' argument, it had no mandatory duty to undertake rulemaking. Moreover, EPA concluded that the scientific evidence before it in reviewing the petition, including the National Research Council's report, *Climate Change Science: An Analysis of Some Key Questions* (2001) ("NRC Report"), was "extraordinarily complex and still evolving" and reflected "'considerable uncertainty in current understanding of how the climate system varies naturally and reacts to emissions of [greenhouse gases].'" Pet. App. A83 (quoting NRC Report). EPA also observed that, given the global nature of atmospheric concentrations of CO_2, it is "extremely difficult to evaluate" to what extent any "effects in the U.S. would be related to anthropogenic [CO_2] emissions in the U.S." *Id.* at A73.

In light of the scientific uncertainty on these critical issues, EPA found no basis for making an endangerment determination and regulating motor vehicles' greenhouse gas emissions under section 202(a) of the CAA. *Id.* at A86 (declining to regulate "[u]ntil more is understood about the causes, extent and significance of climate change"). EPA concluded that "establishing [greenhouse gas] emission standards for U.S. motor vehicles at this time would require EPA to make scientific and technical judgments without the benefit of the studies being developed to reduce uncertainties and advance technologies." *Id.* at A85. EPA also referred to additional policy factors counseling against granting the petition: the risk that imposing domestic emission controls would undermine efforts to negotiate global climate change solutions with foreign governments; inefficiencies associated with piecemeal regulation; and technological limitations. See *id.* at A85-A87. Accordingly, EPA determined that, even if it

had authority under the CAA to undertake rulemaking, it had neither an obligation nor a sound basis to do so.

III. The Court Of Appeals' Decision

Without deciding whether section 202(a)(1) or any other CAA provision authorizes EPA to regulate for global climate change purposes, see *id.* at A10 & n.1, the D.C. Circuit, in a lead opinion authored by Judge Randolph, denied the petitions, holding that, even assuming *arguendo* EPA has such authority, it properly exercised its discretion in denying the rulemaking petition. *Id.* at A11-A15 (Randolph, J.); see also *id.* at A20 (Sentelle, J., concurring in the judgment). Judge Sentelle found that petitioners lacked standing because they failed to show particularized injury, *id.* at A16-A19; he therefore would have dismissed the petitions for review for lack of jurisdiction. Judge Sentelle nevertheless joined in the judgment denying the petitions because, in his view, a panel majority (consisting of Judges Randolph and Tatel) "h[e]ld[] that we have jurisdiction to render judgment," and because denial of those petition was the "judgment closest to that which I myself would issue." *Id.* at A20 (Sentelle, J.). But see *id.* at A21 ("Judge Randolph does not resolve whether petitioners have standing.") (Tatel, J., dissenting). Judge Tatel found that at least one petitioner (Massachusetts) had standing, *id.* at A27, and he dissented from the panel's judgment on the merits, concluding that EPA had "misinterpreted the scope of its statutory authority" and had provided a legally inadequate justification for the petition denial, *id.* at A58. The court denied petitions for rehearing. *Id.* at A94-A98.

SUMMARY OF ARGUMENT

Petitioners seek to use this litigation as part of an effort to effect a momentous reversal of the federal government's pol-

icy on global climate change—an issue with sweeping implications for our nation's domestic and international affairs. Congress and the President have determined that the nation's interests are best served by approaches to global climate change that involve supporting climate change research, developing and deploying advanced technologies, encouraging voluntary projects to limit greenhouse gas emissions, and pursuing diplomatic negotiations to achieve international agreements. Congress and the President have deliberately eschewed mandatory greenhouse gas emission reduction requirements.

Dissatisfied with the results of the political process, petitioners urge this Court to hold that EPA wrongly concluded it lacks authority under the CAA to impose such emission reduction requirements. They argue also that EPA, in declining to initiate rulemaking, reached an incorrect conclusion in its consideration of scientific uncertainty in the record before it and erred by weighing other factors that Executive Branch agencies may properly consider in deciding whether and when to commit their administrative resources to new rulemaking. Petitioners' arguments must be rejected.

First, the Court should dismiss these cases because petitioners lack standing. Petitioners failed to show injury-in-fact because the evidence before the court of appeals—declarations that speak of projected risks of effects over periods of decades in the future—demonstrates no imminent, impending harm of the sort this Court repeatedly has required before a federal lawsuit may proceed. Petitioners also failed to show that EPA's decision not to initiate rulemaking to impose limits on certain greenhouse gas emissions from new motor vehicles in the United States caused their asserted harm. Petitioners admit that these emissions represent but a fraction of the worldwide atmospheric concentrations of greenhouse gases that they assert are the source of their al-

leged harm. Equally important, petitioners did not and cannot show that reversal of the judgment below would redress the injuries they claim. Indeed, CAA provisions on which they rely make clear that, even if they were to prevail here, emission reductions might well occur, if at all, too late to redress any imminent injury.

Second, the D.C. Circuit properly found that EPA's denial of the petition for rulemaking was a permissible exercise of its broad administrative discretion. Under established administrative law principles, an agency's denial of a rulemaking petition is afforded the highest degree of deference, and courts should overturn such a decision only in the most extraordinary circumstances. No such circumstances exist here. EPA met the APA's requirement that it provide a reasoned basis for its denial. Moreover, in determining that it was not appropriate to undertake rulemaking in response to the petition, EPA properly relied on evidence of scientific uncertainty in the record before it and properly considered other, pertinent policy factors. Further, unlike some other provisions of the Act, section 202(a)(1) does not constrain EPA's authority to determine *when* rulemaking may be appropriate; Congress gave EPA broad discretion to decide the timing of any rulemaking or regulation under that section.

Third, upon reviewing the Act as a whole, its legislative history, and other relevant congressional actions and enactments, EPA reasonably concluded that it has no authority under the CAA to regulate greenhouse gas emissions from new motor vehicles to address global climate change. This conclusion fully comports with the statute and reflects a permissible interpretation that this Court should affirm.

ARGUMENT

I. This Case Must Be Dismissed Because Petitioners Lack Standing.

Parties asking federal courts to adjudicate their claims must, under Article III of the Constitution, establish their standing to do so. *FW/PBS, Inc.* v. *City of Dallas*, 493 U.S. 215, 231 (1990); see *DaimlerChrysler* v. *Cuno*, 126 S. Ct. 1854, 1861 n.3 (2006) ("the party asserting federal jurisdiction when it is challenged has the burden of establishing it"); *Elk Grove Unified Sch. Dist.* v. *Newdow*, 542 U.S. 1, 11 (2004) ("In every federal case, the party bringing the suit must establish standing to prosecute the action."); *Steel Co.* v. *Citizens for a Better Env't*, 523 U.S. 83, 104 (1998) ("the party invoking federal jurisdiction bears the burden of establishing its existence"). Standing "must affirmatively appear in the record." *FW/PBS*, 493 U.S. at 231 (internal quotations and citation omitted). Indeed, where, as here, standing is challenged, federal courts *must presume lack* of jurisdiction "unless the contrary appears affirmatively from the record." *Renne* v. *Geary*, 501 U.S. 312, 316 (1991) (internal quotation marks and citations omitted), quoted in *DaimlerChrysler*, 126 S. Ct. at 1861 n.3. This rule follows from the principle that "[a] federal court is powerless to create its own jurisdiction by embellishing otherwise deficient allegations of standing." *Whitmore* v. *Arkansas*, 495 U.S. 149, 155-56 (1990).

Thus, to avoid dismissal of this case, petitioners must discharge their burden of demonstrating affirmatively—based on the record before the reviewing court below—that they satisfy each element of Article III standing: that they (1) suffered actual injury that was (2) "fairly traceable" to EPA's denial of their rulemaking petition and (3) "likely" to be redressed by "a favorable decision." *Allen* v. *Wright*, 468 U.S. 737, 751 (1984) (internal quotation marks and citations omit-

ted); see also *DaimlerChrysler*, 126 S. Ct. at 1861 (quoting *Allen*, 468 U.S. at 751); *Lujan* v. *Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992). Standing will not be found absent allegations of "specific, concrete facts demonstrating that the challenged practices harm [petitioners], and that [petitioners] personally would benefit in a tangible way from the court's intervention." *Warth* v. *Seldin*, 422 U.S. 490, 508 (1975).

In the present case, petitioners' standing was: (1) challenged by EPA in the court of appeals; (2) found to be absent by one of the three members of the panel, see Pet. App. A16 (Sentelle, J., concurring in the judgment); and (3) was questioned and not clearly found to exist by one of the other three judges, see *id.* at A8-A9 (Randolph, J.); *id.* at A21 (Tatel, J., dissenting) ("Judge Randolph does not resolve whether petitioners have standing"). But see *id.* at A20 ("The majority today holds that we have jurisdiction to render judgment . . . .") (Sentelle, J.). Thus, even though petitioners' constitutional standing was put in issue, the court of appeals articulated no clear holding that standing was present.

After petitioners sought review here, EPA presented a detailed argument that petitioners had failed to demonstrate standing. Br. for Fed. Resp. in Opp. 10-15. Yet, notwithstanding that federal appellate courts must always assure themselves of the existence of their own and any lower court's Article III jurisdiction, *Bender* v. *Williamsport Area Sch. Dist.*, 475 U.S. 534, 541 (1986), petitioners here offer no affirmative argument that they have standing. Because the record discloses no basis for concluding that petitioners satisfy each element of "the irreducible constitutional minimum of standing"—injury-in-fact, causation, and redressability—the petition for review must be dismissed.

A. The Record Does Not Demonstrate Direct And Imminent Injury To Petitioners.

It is a long-established rule that, where a party seeks "to invoke the judicial power to determine the validity of executive . . . action," that party "must show that *he has sustained, or is immediately in danger of sustaining,* a *direct injury* as the result of that action." *Ex Parte Levitt*, 302 U.S. 633, 634 (1937) (emphasis added); see also *DaimlerChrysler*, 126 S. Ct. at 1863 (asserted injury must be shown to be "'imminent'—that . . . is[,] 'certainly impending'") (quoting *Whitmore*, 495 U.S. at 158). To have standing, a party "must have suffered an 'injury in fact'—an invasion of a legally protected interest which is (a) concrete and particularized, . . . and (b) *actual or imminent*, not conjectural or hypothetical." *Lujan*, 504 U.S. at 560 (emphasis added; citations and internal quotation marks omitted). A review of the record—in which, as noted above, standing "must affirmatively appear," *FW/PBS*, 493 U.S. at 231—shows that petitioners failed to demonstrate direct, actual, imminent injury and therefore fail to meet the injury-in-fact requirement.

For the reasons Judge Sentelle described in his concurring opinion, petitioners' declarations supported at most only generalized injury. Pet App. A18-A19 (Sentelle, J., concurring). Even accepting *arguendo*, however, the view that petitioners' declarations below showed particularized injury, those declarations establish only a possibility of harm at some point in the future, not the "actual or imminent" injury this Court's decisions require. *Lujan*, 504 U.S. at 560. Petitioners failed to show they "sustained or [were] *immediately in danger* of sustaining some direct injury" from EPA's denial of the petition. *City of Los Angeles* v. *Lyons*, 461 U.S.

95, 102 (1983) (emphasis added) (internal quotation marks and citations omitted).[4]

The declaration of Michael MacCracken, for example, referred to computer model simulations that "projected an annual average warming of about 3 to 5°C. . . . across the U.S. *during this century*." J.A. 232-33 (emphasis added). Dr. MacCracken also discussed projections that the 24-hour average heat index would increase "by at least 6°C . . . over most of the country *by 2100*." *Id.* at 233 (emphasis added). And he discussed an estimate that effects of projected global warming "and other factors affecting the amount of water stored in reservoirs and underground" will cause certain amounts of sea-level rise "by 2100." *Id.* at 234. "More frequent flooding and inundation," he added, "have the *potential* for developing." *Id.* at 235 (emphasis added).

Similarly, Paul Kirshen's declaration, on which Judge Tatel principally relied in arguing that petitioners met the injury-in-fact requirement, see Pet. App. A27 (Tatel, J., dissenting), speaks of an average world-wide sea-level rise "by 2100" and says a certain projected sea-level rise "would mean the future 10-year flood surge elevation would be at the level of the current 100-year flood elevation and the future 100-year flood surge elevation would be at that of the current 500-year flood elevation." Kirshen Decl. ¶¶ 6, 10 (filed in the court of appeals in petitioners' Standing Appendix, Vol. II, at 196, 197-98); see *id.* ¶ 11 (expressing "opinion that when sea level rises 0.3 meters . . . in the Boston area, we will experience the equivalent of what we now think of as a 100-year flood every 10 years"), Standing App. 198.

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[4] The petition for rulemaking here sought regulation "to prevent *future* harm," J.A. 21 (emphasis added), not current, demonstrated injury. See also *id.* at 35 (petition for rulemaking) ("greenhouse gases *will* adversely affect human health and welfare in the United States") (emphasis added).

Estimated risks of projected effects developing over decades in the future is not the "concrete," "imminent," *Lujan*, 504 U.S. at 560, "direct," and "immediately . . . danger[ous]" harm, *Levitt*, 302 U.S. at 634, that is necessary for standing. Indeed, this Court held in 2003 that Senator McConnell lacked standing to challenge a campaign finance law that could not apply to him before the 2008 elections. *McConnell* v. *FEC*, 540 U.S. 93, 226 (2003). Because the feared injury would not be felt immediately—was not, in other words, "'certainly impending'"—it was simply "too remote temporally to satisfy Article III standing." *Id.* (emphasis omitted). If injury a few years away could not, under this Court's precedents, give rise to constitutional standing, a projection of a risk of sea-level rise developing gradually over decades-long periods in the future cannot suffice. See also *Shain* v. *Veneman*, 376 F.3d 815, 818-19 (8th Cir. 2004) (the risk of injury from a sewage plant built on a 100-year flood plain was too "remote"; an "imminent" harm must be "immediate"), cert. denied, 543 U.S. 1090 (2005).

Accordingly, petitioners made no showing that the "threat of injury" is "'real and immediate,'" *Lyons*, 461 U.S. at 102, "'imminent,'" *Lujan*, 504 U.S. at 564 n.2, and "certainly impending," *Whitmore*, 495 U.S. at 158—"concrete" not only in a "qualitative" but also in a "temporal sense," *id.* at 155. The "some day" injuries that petitioners allege are inadequate to support standing. *Lujan*, 504 U.S. at 564 n.2.

B. Petitioners Showed Neither That EPA's Denial Of The Rulemaking Petition Caused Their Alleged Harm Nor That A Favorable Decision Would Redress That Harm.

To survive a standing challenge, petitioners must demonstrate affirmatively not only injury-in-fact but also "a causal connection between the injury and the conduct complained

of." *Id.* at 560. "[T]he injury has to be 'fairly . . . trace[able] to *the challenged action of the defendant, and not . . . th[e] result [of] the independent action of some third party* not before the court.'" *Id.* (emphasis added) (quoting *Simon* v. *Eastern Ky. Welfare Rights Org.*, 426 U.S. 26, 41-42 (1976)). Furthermore, "it must be 'likely,' as opposed to merely 'speculative,' that the injury will be 'redressed by a favorable decision.'" *Id.* at 561 (quoting *Simon*, 426 U.S. at 38, 43).

Petitioners meet neither the causation nor the redressability criteria. They failed to establish that their asserted injuries (assuming *arguendo* that those injuries constituted injury-in-fact for standing purposes) were caused by EPA's denial of their petition requesting regulation of greenhouse gas emissions from new motor vehicles in the United States. In fact, a review of petitioners' declarations shows that the alleged injury is traceable to independent forces beyond the reach of the regulation petitioners seek. For similar reasons, petitioners failed to show that it is more than speculative to suppose that reversing EPA's denial of the rulemaking petition would redress their asserted injuries. Indeed, a CAA provision cited by petitioners—section 202(a)(2), 42 U.S.C. 7521(a)(2), which authorizes potentially prolonged deferral of the effectiveness of promulgated section 202(a)(1) regulations—highlights the conjectural nature of the notion that the relief sought here is "likely" to remedy any "imminent" harm.

1. Petitioners Failed To Show Causation.

If accepted as true, Petitioners' declarations indicate at most that emissions of greenhouse gases from a multitude of diverse sources across the planet generally will lead to global climate changes, and that global climate changes in turn will cause, or create a risk of causing, adverse effects. Petitioners did not show that EPA's denial of regulation of greenhouse

gas emissions *from new motor vehicles in the United States*—the only sources at issue in this case—caused their alleged injuries. This is illustrated by Judge Tatel's dissenting opinion:

> As to causation, the declaration of Michael MacCracken . . . states that global warming is causing sea level increases like those in Massachusetts [citing MacCracken Decl. ¶ 5(c)-(d), J.A. 225]. . . . MacCracken further states that global warming is chiefly triggered by human-caused [greenhouse gas] emissions, *see id.* ¶¶ 5(a)-(b), 12-19 [J.A. 224-25, 229-32], with "the U.S. transportation sector (mainly automobiles) . . . responsible for about 7% of global fossil fuel emissions," *id.* ¶ 31 [J.A. 238].

Pet App. A28. Another of petitioners' declarations reports that the percentage of "global [greenhouse gas] emissions" that is attributable to "U.S. mobile sources, the subject of this action," is lower still: 4 percent. Oppenheimer Decl. ¶ 3, Standing App., Vol. II, at 232. The record thus provides no basis for concluding that asserted harm from global climate change is caused by the limited fraction of worldwide emissions attributed to "the U.S. transportation sector" or "U.S. mobile sources," rather than, for example, emissions from other manmade and natural sources of greenhouse gases around the globe and perhaps other factors.[5] Furthermore, as

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[5] The MacCracken declaration, for example, suggests some global warming is traceable to "natural oscillations" in climate. J.A. 230 ("The warming has also been larger than could be explained by past natural oscillations in the climate since the end of the last glaciation about 10,000 years ago."). Other causes, independent of anthropogenic greenhouse gas emissions, also are indicated by petitioners' declarations. See, e.g., Oppenheimer Decl. ¶ 3 (atmospheric greenhouse gas concentrations in part "reflect . . . loss of forests globally"), Standing App. 232.

EPA determined in denying the rulemaking petition, "[t]he long-lived nature of the CO_2 global pool would . . . make it extremely difficult to evaluate the extent over time to which effects in the U.S. would be related to anthropogenic emissions in the U.S."—including, of course, emissions from the U.S. transportation sector. Pet. App. A73.

Even if the U.S. transportation sector *were* shown to be responsible, however, one cannot tell from the record whether the asserted harm would occur but for emissions from *new* U.S. motor vehicles—a subset of all U.S. motor vehicles, itself a subset of the fraction of "global fossil fuel emissions" attributed by petitioners to "the U.S. transportation sector." J.A. 238. This point is critically important because section 202(a)(1) authorizes regulation *only* of emissions from new U.S. motor vehicles. It does not, for example, authorize control of emissions from "the U.S. transportation sector," from all motor vehicles throughout the world, or even from on-the-road, registered motor vehicles in this country.

The record also would not support any argument that any putative current harm is traceable to the challenged EPA decision. The MacCracken declaration suggests that the cause of alleged injury is a general increase in global "atmospheric concentrations" of three greenhouse gases "*since about 1750* as a result of human activities, principally the combustion of fossil fuel." *Id.* at 224 (emphasis added). It is this general increase in global atmospheric concentrations of certain gases as a consequence of humanity's activities worldwide stretching back to the dawn of the Industrial Revolution—*not* EPA's denial in 2003 of a request to initiate rulemaking to control emissions from American cars and trucks to be built in future years—that, in the words of petitioners' declarant, is "widely considered to be the major factor responsible for the

global warming . . . that occurred during the 20th century." *Id.*

Further, the Kirshen declaration—on which Judge Tatel relied in arguing that a rise in sea level along the Massachusetts coast was traceable to global climate change generally—undermines rather than supports attribution of alleged injuries from that sea-level rise to greenhouse gas emissions from U.S. motor vehicles. Mr. Kirshen declares that an independent, extraneous factor "contributes significantly" to sea-level rise in Massachusetts:

> [I]n the Boston area, *land subsidence* also contributes significantly to sea level rise. Over the past century, approximately 15 cm (5.9 inches) of the rise in sea level that has occurred in Boston is attributable to land subsidence.

Kirshen Decl. ¶ 6 (emphasis added), Standing App. 197. The declaration offers no information about what part of this sea-level rise is due to global warming, to greenhouse gas emissions generally, or to greenhouse gas emissions from the transportation sector, motor vehicles, U.S. motor vehicles, or—what is actually relevant here—new U.S. motor vehicles. The declaration does disclose, however, that the sea-level rise (15 centimeters) that Mr. Kirshen says "is attributable" to the extraneous factor of land subsidence is at *the mid-point* of the range of the asserted "global average sea level rise of 10-20 cm" during the 20th century. *Id.* (citing MacCracken Decl.), Standing App. 196; see J.A. 234 (MacCracken Decl.) (range of 10 to 20 centimeters). Accordingly, given this record, any argument that the asserted Massachusetts sea-level rise—to which Judge Tatel pointed as the best evidence that standing exists—is traceable to EPA's challenged decision or to new U.S. motor vehicles' greenhouse gas emissions, rather than to

other factors such as the land subsidence petitioners' declaration identifies, rests on mere conjecture.

Equally unsupported is any conclusion that projected *future* sea-level rise will result from EPA's decision not to undertake a section 202(a)(1) rulemaking to control new U.S. motor vehicles' greenhouse gas emissions. To the contrary, the Kirshen declaration gives reason to conclude that sea-level rise will occur "regardless of" global climate change—and, thus, regardless of any effects of new U.S. motor vehicles' greenhouse gas emissions: "This rise in sea level due to [land] subsidence would be expected in the next century in the Boston area regardless of, and in addition to, the projected rise in sea level due to climate change." Kirshen Decl. ¶ 6, Standing App. 197. The MacCracken declaration reflects the point more broadly: "To determine the projected sea level rise at a particular location, the local rate of subsidence or uplift must also be accounted for." J.A. 234. In short, based on petitioners' evidence in the record, it is speculative whether the alleged injury from the sea-level rise they describe is traceable at all to EPA's decision or to the vehicle emissions they seek to have regulated. Standing does not exist where, as here, "[s]peculative inferences are necessary to connect [petitioners'] injury to the challenged actions." *Simon*, 426 U.S. at 45.

2. Petitioners Failed To Show Redressability.

Even assuming *arguendo* that petitioners suffer injury-in-fact caused by EPA's denial of the rulemaking petition, petitioners failed to demonstrate that a decision in their favor in this case would redress that injury. Indeed, petitioners failed to clear even the initial hurdle: showing that the judicial relief they seek would yield a different regulatory outcome. Beyond that, petitioners made no showing that, even if EPA adopted regulations limiting greenhouse gas emissions from

new U.S. motor vehicles, the global climatic phenomena they describe would be abated so as to remedy the harm they claim. Finally, petitioners did not show that any such regulation would occur soon enough to redress any current or any imminent, impending injury—the only kinds of injury cognizable under standing law.

a. Petitioners ask this Court to "remand" EPA's denial of the rulemaking petition "with directions to apply the correct legal standard to this matter; that is all." Pet. Br. 3. Thus, they say, "judgment in favor of petitioners will not mandate regulation of air pollutants associated with climate change, nor will it dictate a particular answer to the [endangerment] question" they want EPA to decide. *Id.* In other words, petitioners' own characterization of the relief they seek makes entirely speculative whether a decision in their favor in this case will in any measure remedy the injuries asserted in their standing declarations.

With petitioners suggesting no way around this obstacle to adjudication of their claims, *amici* U.S. Conference of Mayors, *et al.*, offer one—but it turns out to be a dead end. *Amici* acknowledge the "uncertainty introduced by the limited nature of the relief sought by Petitioners" because "Petitioners are not asking for an order requiring EPA to regulate greenhouse gases under Section 202." Brief of the U.S. Conference of Mayors, *et al.*, as *Amici Curiae* in Support of Petitioners at 28 n.49. They argue, however, that petitioners assert a "procedural" right: the supposed right to have "EPA follow the mandatory procedures" in section 202(a)(1) of the Act. But that provision *has* no mandatory procedures, and the procedural right that petitioners *did* have—their right under the Administrative Procedure Act to obtain an Agency decision on their rulemaking petition—was asserted and vindicated through earlier litigation in the district court. See *supra* at 3. *Amici*'s citation of note 7 in *Lujan*—recognizing

the possibility of relaxation of "the normal standards for redressability and immediacy" for litigants asserting unsatisfied procedural rights such as the right to agency compliance with an environmental impact statement requirement, 504 U.S. at 572 & n.7—is, thus, unavailing; petitioners are entitled to no relaxation of normal redressability standards.

b. Petitioners failed to demonstrate that a *reduction* in the limited fraction of global greenhouse gas emissions represented by new U.S. motor vehicles would redress their asserted injury. Petitioners did not allege, and could not plausibly argue, that regulation of new U.S. motor vehicles would *eliminate* greenhouse gas emissions from those vehicles;[6] eliminating those emissions presumably would require a regime mandating that no new cars or trucks could burn gasoline, diesel fuel, or other fossil fuels, and petitioners purport to disclaim any intent to bring about such radical changes. See Pet. Br. 19-20 & n.10; see also Pet. App. A82 (in denying the rulemaking petition, EPA concluded that promulgation of greenhouse gas emission standards for new motor vehicles would not be "effective . . . at this time").

The MacCracken declaration, on which Judge Tatel relied in dissent, offers the following "[s]ummary of [o]pinion[]": "Achievable reductions in emissions of CO_2 and other greenhouse gases from U.S. motor vehicles would significantly reduce the build-up in atmospheric concentrations of these gases and delay and moderate many of the adverse impacts of global warming." J.A. 225-26. The declarant, however, provided no information supporting or explaining the basis for this conclusory statement. What kinds of reductions are

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[6] Indeed, as noted above, petitioners stated that the entire U.S. transportation sector (not limited to new U.S. motor vehicles) is responsible for about 7 percent of global fossil fuel emissions. J.A. 238. Petitioners failed to demonstrate even that elimination of *all* emissions from the *entire* U.S. transportation sector would redress their asserted injuries.

"[a]chievable"? In what timeframe are they achievable? What amount of reductions would result? Perhaps most important: To what degree, if at all, would "[a]chievable reductions" "delay and moderate" the specific injuries petitioners allege as a basis for their standing, such as sea-level rise in Massachusetts? No answers are given.

In the absence of support for a conclusion that achievable emission reductions from new motor vehicles in the United States alone will redress their asserted harms, petitioners resort to a theory that adoption of new motor vehicle emission standards in this country under CAA section 202(a)(1) will trigger similar regulation by independent foreign governments, yielding a supposed multinational reduction in greenhouse gases that will some day mitigate some of the projected effects of global climate change:

> If the U.S. takes steps to reduce motor vehicle emissions, other countries are very likely to take similar actions regarding their own motor vehicles using technology developed in response to the U.S. program, thereby multiplying the total emission reduction benefit of the U.S. action. This would discernibly and significantly reduce and delay projected adverse consequences of global warming, and greatly improve the likelihood that there would be time for additional development and use of even better technologies. With such efforts, accompanied by progress in limiting other emissions, it would be much more likely that the extent of climate change could ultimately be limited to levels that would avoid the most serious impacts of global warming.

Id. at 239. Another declaration makes a similar assertion. See Pet. App. A29 (Tatel, J., dissenting) (quoting Walsh Decl. ¶ 10 ("establishing emissions standards for pollutants

that contribute to global warming would lead to investment in developing improved technologies to reduce those emissions from motor vehicles, and . . . successful technologies would gradually be mandated by other countries"), J.A. 244); see also Walsh Decl. ¶ 12, J.A. 245.

Petitioners' theory is fatally flawed. It rests on an inescapably speculative series of suppositions: that (1) a favorable decision in this case would trigger regulation in the United States of new motor vehicles, which in turn would (2) start a chain reaction of similar regulation by governments in (unidentified) foreign countries, which eventually would (3) moderate alterations in the planet's climate, in turn (4) avoiding some unspecified adverse effects of global warming. First, courts do not and cannot find standing where a claim that "injury would be redressed by a favorable decision in th[e] case [at hand] depends on the unfettered choices made by independent actors not before the courts and whose exercise of broad and legitimate discretion the courts cannot presume either to control or to predict." *ASARCO Inc.* v. *Kadish*, 490 U.S. 605, 615 (1989) (opinion of Kennedy, J.); see also, *e.g.*, *DaimlerChrysler*, 126 S. Ct. at 1863. Whatever effects a favorable decision for petitioners in this litigation may have on EPA regulatory policies, on domestic United States emissions, and on petitioners' claimed injuries—and any such effects are themselves enormously uncertain, for reasons discussed above—that decision's possible effects on actions of foreign sovereigns is something United States courts plainly "cannot presume either to control or to predict." *ASARCO*, 490 U.S. at 615. Petitioners' redressability theory rests on conjecture.

Second, as noted above, the MacCracken declaration predicts that the asserted reduction and delay in global warming's effects would "greatly improve the likelihood that there would be time for additional development and use of even

better technologies." J.A. 239. The declaration thus asserts that some increase in the probability of development and use of some "better"—but undefined—technologies would materialize at some point in the future if unspecified foreign governments follow the United States' lead in regulation. Nothing concrete is offered, however, to support this hypothesis.

Third, Dr. MacCracken's declaration qualifies its central prediction—*i.e.*, that the likelihood of avoiding "the most serious impacts" would be increased by potential future foreign controls on motor vehicles, *id.*—by making even that vague prognostication conditional both on (as discussed above) future invention and application of unidentified "better" technologies that do not now exist *and* on "progress in limiting other emissions," *id.* This last factor is also extraneous and independent: "limiting other emissions" presumably means limiting greenhouse gas emissions from sources other than motor vehicles—something that is outside the scope of the regulation petitioners seek in this case and that *petitioners themselves* argue cannot be thought to result from a decision in their favor here. See Pet. Br. 27-29. Petitioners' multiple layers of speculation defeat any claim of redressability.

c. Accepted at face value (and putting to one side their speculative nature), petitioners' declarations establish that any conceivable "redress" would occur only well in the future, long after the time when any current or *imminent* injury[7] could be remedied through the emission regulation petitioners seek. This is illustrated by the MacCracken declaration's reliance on its extended chain of hypothesized events involving future regulatory actions by foreign governments, "additional development and use of even better technologies," and

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[7] See *Lujan*, 504 U.S. at 564 n.2 (noting "the settled requirement that the injury complained of be, if not actual, then at least *imminent*") (emphasis in original).

future "progress in limiting other emissions"—a collection of scenarios that in concert "could *ultimately*," it is claimed, avoid some effects of global warming. J.A. 239 (emphasis added); see also *id.* at 244 (Walsh Decl.) (predicting that, if petitioners obtain the requested domestic regulation, "successful technologies would *gradually* be mandated by other countries") (emphasis added). This postulated "ultimate[]" relief, materializing only upon the occurrence of possible future events over an indefinite period in years to come, cannot be squared with an argument that the injury thus "remedied" was, at the time this litigation commenced,[8] "imminent" and "impending."

This fatal inconsistency in petitioners' position is only emphasized by their assurance that any new motor vehicle emission regulations promulgated under section 202(a)(1) of the Act need not—thanks to section 202(a)(2) and other provisions of section 202—become effective for an indeterminate, and possibly prolonged, period, irrespective of the "endangerment." Under section 202(a)(2) and 202(a)(4)(A), petitioners observe,

> a range of factors beyond "endangerment" are relevant, including the time needed "to permit the development and application of the requisite technology," taking compliance costs into account [citing CAA § 202(a)(2)], and the existence of "an unreasonable risk to public health, welfare, or safety" due to the "operation or function" of an emission control "device, system, or element of design" [citing CAA § 202(a)(4)(A)].

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[8] "[S]tanding is to be determined as of the commencement of suit." *Lujan*, 504 U.S. at 570-71 n.5 (plurality opinion).

Pet. Br. 36. Indeed, the statute imposes no deadline by which any emission controls would have to take effect; section 202(a)(2) says that "[a]ny regulation prescribed under paragraph (1) of this subsection . . . *shall take effect after such period as the Administrator finds necessary to permit the development and application of the requisite technology*, giving appropriate consideration to the cost of compliance within such period." 42 U.S.C. 7521(a)(2) (emphasis added); see also Pet. Br. 40 ("the remainder of section 202 [beyond section 202(a)(1)] . . . direct[s] EPA's attention to the availability of technology" in setting emission controls' effective date). Given these statutory provisions, petitioners cannot show that the emission controls they seek would take effect quickly enough to remedy any imminent, impending injury.[9]

II. In Declining To Undertake Rulemaking, EPA Exercised Its Administrative Discretion Reasonably And Consistently With The Act.

The court of appeals properly found that EPA's denial of the petition for rulemaking was a reasonable exercise of the Agency's broad discretion. EPA's decision was consistent with the firmly established principle that Executive Branch agencies have authority to decide whether and when to undertake rulemaking. Moreover, EPA more than satisfied the APA's requirement that agencies explain "the grounds for denial." 5 U.S.C. 555(e). Further, contrary to petitioners' argument, it was perfectly consistent with the CAA for EPA

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[9] See, *e.g.*, 59 Fed. Reg. 16,262, 16,263, 16,267 (1994) (emission control requirements promulgated by EPA in 1994 under section 202(a)(1) for certain motor vehicles would not "begin implementation" until model year 2004—nearly a decade after promulgation—with implementation phased in over three years; EPA determined "[t]his schedule will permit the development and application of cost-effective, and economically achievable technology, as required by section 202(a)(2).").

to consider scientific uncertainty and other policy factors in determining that no adequate basis existed, on the record before it, to make an "endangerment" determination and to conduct rulemaking under section 202(a)(1) of the Act.

A. Under Fundamental Principles Of Administrative Law, EPA's Denial Of The Petition For Rulemaking Was Well Within Its Discretion.

As recognized in the decisions of the D.C. Circuit—"the premier intermediate court for adjudicating issues of agency power," Cert. Pet. 4—it is a long-standing, bedrock tenet of administrative law that courts must give a high degree of deference to a federal agency's decision, based on the facts and in light of the particular circumstances before it, to decline a request to institute rulemaking proceedings. *National Customs Brokers & Forwarders Ass'n* v. *United States*, 883 F.2d 93, 96 (D.C. Cir. 1989) (Ginsburg, R.B., J.) (The scope of review of an agency's denial of a rulemaking petition is "extremely limited" and "highly deferential."). Thus, agency decisions denying rulemaking petitions are subject to reversal "only in the rarest and most compelling of circumstances." *WWHT, Inc.* v. *FCC*, 656 F.2d 807, 818 (D.C. Cir. 1981); see also *Timpinaro* v. *SEC*, 2 F.3d 453, 461 (D.C. Cir. 1993) (same); *National Customs Brokers*, 883 F.2d at 97 (Denials of rulemaking petitions should be overturned "only for compelling cause, such as plain error of law or a fundamental change in the factual premises previously considered by the agency."); *American Horse Protection Ass'n* v. *Lyng*, 812 F.2d 1, 4-6 (D.C. Cir. 1987) (denials of rulemaking petitions entitled to "high end" of range of deference). Indeed, "an agency's refusal to initiate a rulemaking is evaluated with a deference so broad as to make the process akin to nonreviewability." *Cellnet Communication, Inc.* v. *FCC*, 965 F.2d 1106, 1111 (D.C. Cir. 1992). The D.C. Circuit's deci-

sion here comported fully with these settled administrative law precedents.

NRDC v. *SEC*, 606 F.2d 1031 (D.C. Cir. 1979), is that court's "most comprehensive statement . . . as to the availability and scope of review of an agency's decision to deny a petition for rulemaking." *WWHT*, 656 F.2d at 816. There, the D.C. Circuit held that judicial review in such cases is, and must be, extremely limited for numerous reasons:

> An agency's discretionary decision *not* to regulate a given activity is inevitably based, in large measure, on factors not inherently susceptible to judicial resolution—*e.g.*, internal management considerations as to budget and personnel; evaluations of its own competence; weighing of competing policies within a broad statutory framework. Further, even if an agency considers a particular problem worthy of regulation, it may determine for reasons lying within its special expertise that the time for action has not yet arrived. The area may be one of such rapid technological development that regulations would be outdated by the time they could become effective, or the scientific state of the art may be such that sufficient data are not yet available on which to premise adequate regulations. The circumstances in the regulated industry may be evolving in a way that could vitiate the need for regulation, or the agency may still be developing the expertise necessary for effective regulation.

NRDC v. *SEC*, 606 F.2d at 1046 (citations omitted) (emphasis in original). Because, in short, "[t]he agency's determination is essentially a legislative one, . . . the reviewing court should do no more than assure itself that the agency acted in a manner calculated to negate the dangers of arbitrariness and

irrationality." *WWHT*, 656 F.2d at 817 (internal quotation marks and citation omitted).

Given the high degree of deference afforded agencies when they deny rulemaking petitions, "there are very few cases in which courts have forced [an agency] to institute rulemaking proceedings on a particular issue after it has declined to do so." *Id.* at 818. On rare occasions, courts do remand rulemaking petition denials for an adequate explanation where the agency failed to meet the APA's minimal requirement for a brief statement of the grounds for denial. For example, in *American Horse Protection*, the Secretary of Agriculture denied a petition seeking rulemaking to reconsider regulations on the practice of "soring" horses in light of new evidence. 812 F.2d at 1-3. The Secretary's articulated statement of basis for the denial consisted of two conclusory sentences and limited statistical information, *id.* at 5—"insufficient," the D.C. Circuit held, "to assure a reviewing court that the agency's refusal to act was the product of reasoned decisionmaking," *id.* at 6.[10]

In contrast, EPA's denial of the rulemaking petition here was the product of reasoned decisionmaking and supported by grounds articulated by the Agency. The record before the D.C. Circuit enabled that court to "assure itself that the [A]gency considered the relevant factors, that it explained the facts and policy concerns relied on, and that the facts have some basis in the record." *Id.* at 5 (citations and internal quotation marks omitted). EPA provided a full explanation of its reasons for denying the petition in 12 *Federal Register* pages.

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[10] In *National Customs Brokers*, then-Judge Ginsburg, writing for the court, further clarified that the D.C. Circuit's remand in *American Horse Protection* occurred in part because the Secretary's decision contravened an unambiguous statutory command. 883 F.2d at 97. Unlike the rulemaking petition denial in *American Horse Protection*, EPA's denial here contradicted no "crystalline congressional objective." *Id.*

Pet. App. A59-A93; cf. 5 U.S.C. 555(e) (agency must give "a brief statement of the grounds for denial") (quoted in *American Horse Protection*, 812 F.2d at 4). One of the principal grounds EPA gave for its denial was the continued existence of significant scientific uncertainty reflected in the record before it. Pet. App. A82-A85; see also *NRDC* v. *SEC*, 606 F.2d at 1046 ("[T]he scientific state of the art may be such that sufficient data are not yet available on which to premise adequate regulations.") (citations omitted). EPA also discussed, as noted above, other policy concerns that would be raised by granting the petition, Pet. App. A82-A87, and described steps the President was taking to address global climate change issues, *id.* at A87-A92.

Nothing in the record before the court below presented those "rarest and most compelling of circumstances" necessary to overturn an agency denial of a rulemaking petition. *WWHT*, 656 F.2d at 818. Although petitioners obviously disagree with the *merits* of EPA's decision, such disagreement is immaterial where, as here, petitioners do not and cannot show that EPA's decision was unreasoned, or that EPA failed to "explain[] the 'facts and policy concerns' [it] relied on," or that the facts lack "some basis in the record." *American Horse Protection*, 812 F.2d at 5 (citation omitted). Accordingly, consistent with familiar and settled principles of administrative law, the D.C. Circuit properly declined to set aside EPA's decision to deny the request for rulemaking.[11]

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[11] In their reply brief supporting their *certiorari* petition, petitioners characterized EPA's position on this point as reflecting a "claim[] that its decision below may be unreviewable because it involves the denial of a rulemaking petition"; petitioners called this view "extraordinary." Pet. Reply Br. (on *certiorari*) at 5 n.1. In fact, EPA accurately characterized the case law; and, without arguing that denials of rulemaking petitions are wholly immune from judicial review, EPA explained that courts evaluate

B. The Court Of Appeals' Decision Is Fully Consistent With The Clean Air Act.

The D.C. Circuit's decision not to disturb EPA's denial of the rulemaking petition also comports with the CAA. As that court recognized, section 202(a)(1) of the Act provides EPA with discretion in deciding whether and when to exercise its expert "judgment" to determine if new motor vehicles' emissions "may reasonably be anticipated to endanger public health or welfare." 42 U.S.C. 7521(a)(1); Pet. App. A13. Even if EPA had regulatory authority over greenhouse gas emissions as petitioners claim—and EPA does not have that authority, see Argument III *infra*—the Agency had no obligation to exercise its judgment by making an "endangerment" determination in response to ICTA's petition for rulemaking.

The D.C. Circuit properly found no grounds for granting the petitions for review of EPA's denial because the court owed deference to the Agency's expert conclusion that a sound basis for making an endangerment determination did not exist in light of substantial scientific uncertainty in the record before it. Pet. App. A11-A13; see *Ethyl*, 541 F.2d at 20 n.37 (Section 202(a)(1)'s "judgment" language is an "express provision for administrative discretion."). As the court noted, an endangerment determination under the Act "'is necessarily a question of policy that is to be based on an assessment of risks and that should not be bound by either the procedural or the substantive rigor proper for questions of fact.'" Pet. App. A15 (quoting *Ethyl*, 541 F.2d at 24).

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such denials with the greatest deference, as discussed above. Br. for the Fed. Resp. in Opp. at 17-18. To the extent petitioners intended their characterization of EPA's position as a call to overturn this bedrock principle of administrative law—one rooted in constitutional separation of powers—it is *petitioners'* position that is "extraordinary" and should be rejected.

While readily acknowledging that EPA in deciding on the petition "could appropriately consider . . . scientific uncertainty," Pet. Br. 39; see also *id.* at 41,[12] petitioners observe that the mere existence of scientific uncertainty need not paralyze regulators under all circumstances; that is, whatever authority EPA might have to regulate is not necessarily negated by the presence of any degree of uncertainty in the science. See *id.* at 41-42 & n.32 (citing *Ethyl*, 541 F.2d at 25). That principle, however, is hardly a rule that EPA *must* exercise any such authority even in the presence of substantial scientific uncertainty that the government is working to resolve. The D.C. Circuit's decision in *Ethyl* supports EPA's denial of the rulemaking petition at issue here. Pet. App. A13-A14. *Ethyl* did not involve denial of a petition for rulemaking in the face of scientific uncertainty—the kind of agency decision that is subject to an extraordinarily high degree of judicial deference. Far from it: *Ethyl* involved an industry challenge to an EPA decision *to* regulate where there was "less than certainty" about endangerment. *Ethyl*, 541 F.2d at 25. In rejecting the industry challenge, the D.C. Circuit held that an agency is not always obligated to wait for full resolution of scientific questions before commencing regulation. See *id.*; cf. J.A. 15 (ICTA petition for rulemaking: "Under the CAA, the Administrator [of EPA] is *permitted* to make a precautionary decision to regulate pollutants in order to protect public health and welfare." (emphasis added)). *Ethyl* plainly does not stand for the converse proposition petitioners urge here: that EPA *must* grant a petition to regulate despite substantial scientific uncertainty.

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[12] Petitioners therefore disagree with one of their *amici* states, which makes the plainly incorrect claim that consideration of scientific uncertainty is prohibited. Brief of *Amicus Curiae* State of Delaware in Support of Petitioners at 23-24.

Petitioners claim that EPA selectively cited statements of scientific uncertainty in the NRC Report. Pet. Br. 42-43. But, particularly given that petitioners do not dispute that significant and relevant scientific uncertainty exists,[13] petitioners' unproven accusation of selectivity, even if it were correct, is nothing but a plea to substitute *their* assessment for the expert agency's evaluation of available scientific evidence and of the uncertain state of that evidence. That petitioners would—or, indeed, that a reviewing court might—make a decision different from EPA's based on the scientific evidence that was before the Agency does not make EPA's decision arbitrary.

Equally misguided is petitioners' critique of EPA's *Federal Register* discussion as "terse." *Id.* at 43. Even if EPA's description of its reasons could fairly be characterized that way (and it cannot), petitioners do not and cannot cite any authority to support their apparent view that the Agency has a legal obligation, whenever presented with a petition for rulemaking on a technical and scientific matter, to conduct a complete analysis of the body of science on that matter and to prepare and publish in the *Federal Register* a comprehensive report on the results of its evaluation. No such principle could be more foreign to our administrative law, as defined

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[13] See, e.g., Joint Decl. of William D. Solecki, *et al*,. ¶ 8.e. ("[s]ubstantial uncertainties about climate change remain"), Standing App., Vol. II, at 264; *id.* ¶ 9.f. ("There is still considerable uncertainty about the rate and magnitude of projected climate changes."), Standing App. 266. Petitioners' *amici* climate scientists also recognize scientific uncertainty in the record before EPA; they acknowledge that the NRC Report that EPA reviewed "encompasses both the more certain and the less certain elements of the science, and *uncertainties are described explicitly*, as is the norm in scientific reports." Brief of *Amici Curiae* Climate Scientists David Battisti, *et al.*, at 18 (emphasis added); see also *id.* at 29 (discussing scientific uncertainty about whether "current projections" accurately portray "the *extent* of the damage") (emphasis in original).

by Congress and applied by the courts. Such a principle would wreak havoc on Executive Branch agencies' ability to order their administrative resources to accomplish their statutorily defined responsibilities. As discussed above, the APA requires only that a denial of a rulemaking petition "be accompanied by a *brief*"—one might almost say "terse"—"statement of the grounds for denial," 5 U.S.C. 555(e) (emphasis added), and the law is clear that an agency need supply only enough information in denying a rulemaking petition to show that its decision declining to undertake the requested rulemaking "was the product of reasoned decisionmaking." *American Horse Protection*, 812 F.2d at 6. EPA easily met that test here.

An objective review of the NRC Report supports the conclusion that EPA's decision on the rulemaking petition was rational, even if it would have been possible, based on that report, for the Agency to have reached petitioners' desired result. See *Ethyl*, 541 F.2d at 25 (scientific certainty not a prerequisite to CAA regulation). Despite Judge Tatel's "doubt [that] EPA could credibly conclude that it needs more research to determine whether [greenhouse gas]-caused global warming 'may reasonably be anticipated to endanger' welfare," Pet. App. A50-A51 (Tatel, J., dissenting), the extensive passage from the NRC Report that Judge Tatel himself quoted at length reflects *on its face* considerable scientific uncertainty regarding global climate change and its possible effects on public welfare and health. Some examples: (1) "'Changes in storm frequency and intensity are one of the *more uncertain elements* of future climate change prediction.'"—an area of scientific investigation that petitioners' *amici* agree "remains controversial" and as to which there is "a need for additional data";[14] (2) "'[T]he response of insects

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[14] Brief of *Amici Curiae* Ocean and Coastal Conservation Interests in Support of Petitioners at 17 & n.5 (the "assertion" that "hurricane inten-

and plant diseases to warming is *poorly understood.* On the regional scale and in the longer term, there is *much more uncertainty.*'"; (3) "Health outcomes in response to climate change are the *subject of intense debate.* . . . Climate change is just one of the factors that influence the frequency and transmission of infectious disease, and hence the assessments view such changes as *highly uncertain.*'"; and (4) "'The understanding of the relationships between weather/climate and human health is *in its infancy* and therefore the health consequences of climate change *are poorly understood.* The costs, benefits, and availability of resources for adaptation *are also uncertain.*'" *Id.* at A52, A53 (Tatel, J., dissenting) (quoting NRC Report) (emphasis added).

The passage from the NRC Report that Judge Tatel quoted also contains several other statements illustrating substantial uncertainty about whether any basis existed for EPA to make the requested endangerment judgment. For example: (1) "'A key conclusion from the National Assessment [of Climate Change Impacts] is that *U.S. society is likely to be able to adapt to most of the climate change impacts on human systems*, but these adaptations may come with substantial cost.'"; (2) "'In the near term, agriculture and forestry are *likely to benefit* from CO_2 fertilization effects and the increased water efficiency of many plants at higher atmospheric CO_2 concentrations.'"; (3) "'[T]he combination of the geographic and climatic breadth of the United States, possibly augmented by advances in genetics, increases the nation's robustness to climate change.'"; (4) "'[M]uch of the United States *appears to be protected* against many different adverse health outcomes related to climate change by a

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sity" is linked to "warming seas" "remains controversial"; "there is a need for additional data," in part because of "questions about the possible underestimation of the intensity of historic tropical cyclones, thus making more recent storms appear stronger by comparison").

strong public health system, relatively high levels of public awareness, and a high standard of living.'"; and (5) "'At a national level, the direct economic impacts [of global climate change] are *likely to be modest* [while] on a regional basis the level and extent of *both beneficial and harmful impacts* will grow.'" *Id.* at A51, A52, A53, A54 (Tatel, J., dissenting) (quoting NRC Report) (emphasis added).

Given the information in the NRC Report, EPA found, in responding to the petition, that "[t]he science of climate change is extraordinarily complex and still evolving." *Id.* at A83. EPA therefore reasonably concluded that the remaining uncertainties in the evolving science, and the need to continue working to reduce those uncertainties, counseled against regulatory action at that time:

> [T]here continue to be important uncertainties in our understanding of the factors that may affect future climate change and how it should be addressed. As the NRC explained, predicting future climate change necessarily involves a complex web of economic and physical factors including: our ability to predict future global anthropogenic emissions of [greenhouse gases] and aerosols; the fate of these emissions once they enter the atmosphere (e.g., what percentage are absorbed by vegetation or are taken up by the oceans); the impact of those emissions that remain in the atmosphere on the radiative properties of the atmosphere; changes in critically important climate feedbacks (e.g., changes in cloud cover and ocean circulation); changes in temperature characteristics (e.g., average temperatures, shifts in daytime and evening temperatures); changes in other climatic parameters (e.g., shifts in precipitation, storms); and ultimately the impact of such changes on human health and welfare (e.g., increases or decreases in agricultural productivity, human health

> impacts). The NRC noted, in particular, that "[t]he understanding of the relationships between weather/climate and human health is in its infancy and therefore the health consequences of climate change are poorly understood" (p. 20). Substantial scientific uncertainties limit our ability to assess each of these factors and to separate out those changes resulting from natural variability from those that are directly the result of increases in anthropogenic [greenhouse gases].

Id. at A83-A84.

In short, given the evidence of scientific uncertainty described in the information before the Agency, EPA had, and articulated, a rational basis for denying the petition for rulemaking. Nothing more was required.

While focusing on uncertainty in the scientific evidence, EPA also noted additional policy reasons that reinforced its conclusion that it was appropriate to decline to undertake rulemaking. *Id.* at A82-A92. Petitioners argue that EPA may not consider policy reasons under section 202(a)(1) of the CAA at all and that consideration of these reasons here "taints EPA's entire decision." Pet. Br. 41. Petitioners are incorrect. Applying settled principles under the CAA and the APA, the D.C. Circuit properly rejected petitioners' objection because "Congress does not require the Administrator to exercise his discretion solely on the basis of his assessment of scientific evidence." Pet. App. A13 (citing *Ethyl*, 541 F.2d at 20); see *id.* at A15 ("as we have held, a reviewing court 'will uphold agency conclusions based on policy judgments' 'when an agency must resolve issues "on the frontiers of scientific knowledge"'") (quoting *Environmental Def. Fund* v. *EPA*, 598 F.2d 62, 82 (D.C. Cir. 1978)); *Ethyl*, 541 F.2d at 26 ("the [CAA] accords the regulator flexibility to assess risks and make essentially legislative policy judgments"); cf.

WWHT, 656 F.2d at 817 ("The agency's determination is essentially a legislative one, and the reviewing court should do no more than assure itself that the agency acted in a manner calculated to negate the dangers of arbitrariness and irrationality.") (citation and internal quotation marks omitted); *NRDC* v. *SEC*, 606 F.2d at 1046 ("An agency's discretionary decision *not* to regulate a given activity is inevitably based, in large measure, on factors not inherently susceptible to judicial resolution . . . .") (emphasis in original).

Moreover, petitioners ignore a critically important aspect of agency discretion central to this case: Under the CAA and basic administrative law principles, EPA has discretion regarding the *timing* of initiation of any rulemaking under section 202(a)(1). See, *e.g.*, *NRDC* v. *SEC*, 606 F.2d at 1046 ("[E]ven if an agency considers a particular problem worthy of regulation, it may determine for reasons lying within its special expertise that the time for action has not yet arrived."). Unlike numerous provisions in the Act, including other provisions within section 202, see, *e.g.*, CAA § 202(b)(2), 42 U.S.C. 7521(b)(2) (directing EPA to act "within 180 days after November 15, 1990"), section 202(a)(1) imposes no deadline for EPA action. By using such limiting language, Congress cabins—where it intends to cabin—Agency discretion regarding the timing of regulation. No such limiting language appears in section 202(a)(1).

Congress likewise knows how to constrain, through imposition of specific deadlines, EPA's discretion under the Act to decide the timing of decisions *whether it is appropriate to regulate* consistent with substantive statutory criteria. For example, section 109(d) of the Act requires EPA, by December 31, 1980, and every five years thereafter, to "promulgate such new [ambient air quality] standards as may be appropriate" in accordance with other, referenced provisions of the Act. 42 U.S.C. 7409(d); see generally *Environmental Def.*

Fund v. *Thomas*, 870 F.2d 892 (2d Cir. 1989). Congress knows, too, how to require EPA to begin (and to conclude) rulemaking by specific dates. For example, section 202(i)(3)(A), 42 U.S.C. 7521(i)(3)(A), provides that, based on a study and report mandated by section 202(i)(1) and (2), 42 U.S.C. 7521(i)(1), (2), EPA "shall determine, by rule, within 3 calendar years after the report is submitted to Congress, but not later than December 31, 1999," whether (i) a need exists for "further reductions in emissions" of specified pollutants, (ii) "the technology for meeting more stringent emission standards will be available," and (iii) "obtaining further reductions in emissions from such vehicles will be needed and cost effective." The report must be submitted to Congress "no later than June 1, 1997," and the "rulemaking . . . *shall commence within 3 months after submission of the report* to Congress." 42 U.S.C. 7521(i)(2)(B), (3)(A) (emphasis added). In stark contrast, nothing in section 202(a)(1) constrains EPA's discretion to determine when it is appropriate to commence any rulemaking that may be warranted.[15]

Here, EPA determined that it was important to continue a policy of "reducing scientific uncertainties" through additional research, Pet. App. A82, to allow the government to "answer questions about the causes, extent, timing and effects of global climate change that are critical to the formulation of an effective, efficient long-term policy," *id.* at A67. Particularly given the uncertain state of the scientific evidence regarding global climate change and its potential ef-

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[15] Cf. *Sierra Club* v. *Thomas*, 828 F.2d 783, 798 (D.C. Cir. 1987) (EPA's decisions whether to regulate under the Act "often involve[] complex scientific, technological, and policy questions"; thus, absent clear-cut statutory constraints on the timing of those decisions, "EPA must be afforded the amount of time necessary to analyze such questions so that it can reach considered results in a final rulemaking that will not be arbitrary and capricious or an abuse of discretion.").

fects that EPA had before it when it considered the rulemaking petition, the Agency was justified in deciding not to institute rulemaking. EPA did not abuse its broad discretion as to timing by deciding in 2003 that—regardless of whether further resolution of scientific questions might make rulemaking justified in the future—rulemaking would not be appropriate based on the information available to the Agency, and given the circumstances existing, at that time. Consistent with the CAA and with established principles of administrative law, the D.C. Circuit properly declined to disturb EPA's decision.

III. EPA Lacks Authority Under CAA Section 202(a)(1) To Regulate Greenhouse Gas Emissions To Address Global Climate Change.

"[E]mploying traditional tools of statutory construction," this Court should affirm EPA's determination that the CAA does not authorize it to regulate greenhouse gas emissions from new motor vehicles under CAA section 202(a)(1) to address global climate change. *Chevron* v. *NRDC*, 467 U.S. 837, 842-43 & n.9 (1984); see also *Brown & Williamson*, 529 U.S. at 132-33. The traditional tools of statutory construction include a statute's text, its overall structure, and its legislative history. See, *e.g.*, *Whitman* v. *American Trucking Ass'ns*, 531 U.S. 457, 466 (2001) ("Words that can have more than one meaning are given content . . . by their surroundings.") (citing *Brown & Williamson*, 529 U.S. at 132-33; *Jones* v. *United States*, 527 U.S. 373, 389 (1999)); *King* v. *St. Vincent's Hosp.*, 502 U.S. 215, 221 (1991) (statutes must be interpreted and understood as a whole "since the meaning of statutory language, plain or not, depends on context"); *Train* v. *Colorado PIRG*, 426 U.S. 1, 10 (1976) ("When aid to construction of the meaning of words, as used in the statute, is available, there certainly can be no rule of law which forbids its use, however clear the words may ap-

pear on superficial examination.") (quotations omitted). Reading the CAA as a whole, and reading relevant individual provisions in the context of the entire statute and its legislative history, leads to the conclusion EPA reached on this issue. At a minimum, that conclusion does not conflict with the CAA and reflects a permissible interpretation of the Act.

First, where the Act specifically mentions greenhouse gases or global climate change, it expressly clarifies the relevant provision's *nonregulatory* nature. In section 103(g), 42 U.S.C. 7403(g), which refers to "carbon dioxide," Congress stated: "Nothing in this subsection shall be construed to authorize the imposition on any person of air pollution control requirements." Indeed, the word "nonregulatory" appears six times in section 103(g). *Id.* Similarly, section 602(e) of the Act, 42 U.S.C. 7671a(e), directs EPA to publish "the global warming potential" of each substance listed under that subsection. The Act specifically states, however, that this directive "shall not be construed to be the basis of any additional regulation under this [Act]."[16] See Pet. App. A70-A71 (discussing sections 103(g) and 602(e) and pertinent legislative history).

Petitioners unsuccessfully try to explain away these expressions of congressional intent barring any construction of the Act's references to greenhouse gases and global climate change as authorizing regulation. Petitioners say, for example, that "[n]othing in these provisions expressly or impliedly removes the authority granted by section 202(a)(1)." Pet. Br. 22. That argument is circular and illogical: it assumes peti-

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[16] Section 821 of Public Law No. 101-549, to which petitioners refer, Pet. Br. 17 & n.9, directs EPA to issue rules for electric utilities to monitor and report their power plants' CO_2 emissions annually so that EPA can make the aggregate data "available to the public." 42 U.S.C. 7651k Note. That section, which is not part of the CAA, does not authorize regulation of emissions for global climate change or any other purpose.

tioners' premise that section 202(a)(1) provides the authority they claim it does; and, if accepted, it would perversely preclude the Court from learning anything of congressional intent from CAA provisions that—unlike section 202(a)(1)—actually *refer* to greenhouse gases. Petitioners fail to explain why, if the Act provides the broad grant of regulatory authority over greenhouse gases they claim it does, Congress would be concerned to specify that the Act's language referring to those gases must *not* be construed to provide any such authority. At the very least, it plainly was not unreasonable for EPA to read this statutory language as signifying congressional intent to withhold regulatory authority over greenhouse gas emissions to address global climate change.

Second, as EPA explained in denying the rulemaking petition, "the key statutory mechanism for controlling pervasive 'air pollutants'—establishing and implementing national ambient air quality standards under sections 108, 109, and 110—is unworkable for addressing an issue whose causes and effects are global in nature." Pet. App. A64; see *id.* at A72-A74. This point is addressed in detail in the Brief for the Respondent States of Michigan, North Dakota, Utah, South Dakota, Alaska, Kansas, Nebraska, Texas, and Ohio.

Third, as EPA also explained, *id.* at A71-A72, when Congress addressed a global atmospheric phenomenon with international ramifications in the CAA—depletion of the stratospheric ozone layer—it did so specifically in provisions tailored expressly for that problem. In 1990, Congress enacted a separate Title VI of the CAA, 42 U.S.C. 7671-7671q, to address the issue, which "incorporated [the] terms" of the Montreal Protocol on Substances that Deplete the Ozone Layer. *NRDC* v. *EPA*, No. 04-1438, 2006 WL 2472144, at *1 (D.C. Cir. Aug. 29, 2006). Before 1990, Congress also addressed stratospheric ozone depletion under a discrete part of the statute (part B of Title I), 42 U.S.C. 7450-7459 (1988),

which, like the later-enacted Title VI, recognized the global nature of the problem and provided for international coordination. See 42 U.S.C. 7456 (1988) (directing the President to "enter into cooperative research," "negotiate multilateral treaties, conventions, resolutions, or other agreements," and "formulate, present, or support proposals at the United Nations and other appropriate international forums"). Given how Congress treated the international issue of stratospheric ozone protection, it is difficult to believe it would have chosen to authorize EPA to address a similar global issue through the general definitional provisions, discussed *infra*, on which petitioners rely.

Fourth, summarizing a series of nonregulatory statutes that Congress enacted beginning in 1978 and that "specifically address[] global climate change," EPA observed that Congress, at the time of the 1990 Amendments to the CAA, "was awaiting further information before deciding *itself* whether regulation to address global climate change is warranted and, if so, what form it should take." Pet. App. A74-A75 (emphasis in original). Post-1990 congressional actions, EPA further observed, reinforced the conclusion that the CAA could not be interpreted to delegate to EPA authority to impose such regulation "in the absence of any direct or even indirect indication of congressional intent to provide such authority." *Id.* at A75-A76.

As EPA noted, the legislative history of the 1990 Amendments to the CAA provides further support for EPA's determination. In considering those amendments, Congress debated a committee-approved provision imposing limits on carbon dioxide emissions from motor vehicles. Ultimately, Congress decided *not* to include this provision in the Act. But Congress did not reject that provision because members believed the Act *already* authorized greenhouse gas emission limits for motor vehicles. To the contrary, senators' remarks

reveal a shared understanding that rejection of that and similar proposed measures meant there would be no basis in law for such regulation—that, to be authorized, any such regulation required new legislation.

Thus, for example, Senator Lieberman rued the "elimination" of the proposed CO_2 emission limits for motor vehicles without approval of any substitute measure. 136 Cong. Rec. 3730-31 (1990), *reprinted in* 4 Senate Comm. on Env't & Pub. Works, 103d Cong., Legislative History of the Clean Air Act Amendments of 1990, at 5407-10 (1993) ("Legis. Hist."). Senator Baucus, the legislation's floor manager, said that "[a]ny amendment" directing EPA to promulgate CO_2 standards for "tailpipe emissions . . . would be a deal-breaker," *id.* at 3894, *reprinted in* Legis. Hist. at 5492, but that a transportation planning amendment offered by Senator Gore would be "a good start" to address "global warming," emphasizing that "[w]e must start somewhere, and this is a good beginning." *Ibid.* There would have been no need for Congress to "start somewhere" if EPA already had received from it the delegation of regulatory authority petitioners claim it did.

Along these lines, Senator Gore, in discussing his transportation planning amendment—an amendment the House-Senate conference committee ultimately rejected—said it was "unimaginable that this body would take up a Clean Air Act and revisit this question [of global climate change] as extensively as we are doing without grappling at least in some way with the problem of CO_2 emissions." *Id.* at 3893, *reprinted in* Legis. Hist. at 5488-89. If EPA already had authority in the CAA, congressional advocates of regulation would not have emphasized Congress's need to "grappl[e] at least in some way" with regulatory control of greenhouse gas emissions. And these congressional advocates expressed no view that EPA had, either under the pre-existing Act, as petitioners

claim, or under the Act as it was being amended, any authority to adopt greenhouse gas emission limits for new motor vehicles or any other sources.

Without addressing these specific statements regarding congressional intent, petitioners cite *United States* v. *Craft*, 535 U.S. 274 (2002), for the general proposition that "'[c]ongressional inaction lacks persuasive significance because several equally tenable inferences may be drawn from such inaction, including the inference that the existing legislation already incorporated the offered change.'" Pet. Br. 21 (quoting *Craft*, 535 U.S. at 287). *Craft*, however, is readily distinguished. It involved a rejected legislative proposal that would have permitted tax liens on certain property. In nevertheless upholding such a lien, the Court noted that failure of a measure could support several reasonable inferences, including that existing statutory law already incorporated the offered change. *Craft*, 535 U.S. at 287. The Court's opinion examined legislative history showing that Congress rejected the failed tax measure as unnecessary because the measure was viewed as "nothing more than a 'clarification' of existing law" and as "'superfluous'" by the respective chambers. *Id.* (citations omitted). In contrast, the legislative history discussed above shows that congressional advocates of new motor vehicle greenhouse gas emission limits recognized that the failure to enact the proposed *legislative amendments* to effect such control would mean the Act would provide no authority for "grappling . . . in some way with the problem of CO_2 emissions"—a conclusion wholly at odds with the availability of pre-existing regulatory authority that petitioners claim the Act provided.[17] 136 Cong. Rec. 3893 (1990), *reprinted in* Legis. Hist. at 5488-89.

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[17] Cf. *Arkansas Elec. Coop. Corp.* v. *Arkansas Pub. Serv. Comm'n*, 461 U.S. 375, 384 (1983) ("a federal decision to forgo regulation in a given

Petitioners claim, however, that EPA's interpretation of the Act is barred by two provisions that do not refer specifically to greenhouse gases: the general definition of "air pollutant," 42 U.S.C. 7602(g), and a provision listing "effects on welfare," *id.* 7602(h). Under petitioners' interpretation of the statute, Congress, by enacting these two provisions as part of the CAA's "Definitions" section (*id.* 7602), established authority for a sweeping global climate change regulatory program. EPA reasonably concluded instead that the broader statutory context and legislative history refute petitioners' view. See *Whitman*, 531 U.S. at 468 (Congress does not "hide elephants in mouseholes").

Section 302(g) states that "'air pollutant' means any air pollution agent or combination of such agents, including any physical, chemical, biological, radioactive . . . substance or matter which is emitted into or otherwise enters the ambient air." 42 U.S.C. 7602(g). If accepted, petitioners' argument in effect would revise section 302(g) by writing the qualifying words "air pollutant agent" out of the CAA, making *any* substance that enters the ambient air an "air pollutant" potentially subject to CAA regulation. Pet. Br. 12-14; see Pet. App. A78-A79 & n.3.[18]

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area may imply an authoritative federal determination that the area is best left *un*regulated") (emphasis in original).

[18] Petitioners cite methane emission standards for landfills as an example of supposed Agency inconsistency with regard to "air pollutant." Pet. Br. 34. The reasons EPA addressed methane—*e.g.*, its explosive characteristics—have nothing to do with global warming, and EPA identified any global warming benefits as "ancillary." 61 Fed. Reg. 9905, 9917 (1996). Petitioners quote an obvious misstatement in which EPA says those landfill standards regulate CO_2 in addition to methane, Pet. Br. 34 n.5 (quoting 63 Fed. Reg. 6426, 6454 (1998)). The regulated substances unambiguously do *not* include CO_2, as EPA made clear in promulgating the standards. See 61 Fed. Reg. at 9905 (identifying non-methane organic compounds (which did not include CO_2) and methane as the "emissions of concern"). Petitioners also cite selected notices under EPA's Signifi-

In the face of the rule that statutes must, if possible, be construed to give every word effect, *United States* v. *Nordic Village, Inc.*, 503 U.S. 30, 36 (1992), petitioners strain to supply a meaning for Congress's limiting phrase, "air pollution agent," that fits their theory of the Act. Petitioners' idea is that this phrase is not limiting at all but expansive, *i.e.*, that Congress meant it to encompass things *in addition to* "substance[s] or matter"—things, they hypothesize, that "have no mass," such as "heat" and "ionizing radiation." Pet. Br. 14. Yet they offer no authority for this novel interpretation.

In any event, petitioners' argument is beside the point. That argument in fact rests on their wholly improbable premise that section 302(g) *must* be read to define as an "air pollution agent" *any* substance or matter that enters the ambient air. *Id.* at 13-14. In other words, petitioners' position is that EPA had no discretion to determine that *some* substances that enter the ambient air simply do not fit the common understanding of "air pollution agent," see Pet. App. A79 n.3, as meaning something that—unlike CO_2—causes the air that people breathe to become dirty or impure. Under petitioners'

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cant New Alternatives Policy, which addresses stratospheric ozone depletion. Pet. Br. 33. That EPA, under this policy, considers global warming potential as "*a factor* in assessing the *overall* risk" of a possible substitute chemical, see 59 Fed. Reg. 13,044, 13,049 (1994) (emphases added), does not mean it regulates solely or primarily to address global warming; and a single instance in which EPA may have deviated from its policy, see Pet. Br. 33 (citing 64 Fed. Reg. 10,374, 10,375 (1999)), cannot expand Agency authority. Finally, the existence of requirements for monitoring CO_2 emissions from nonroad equipment under CAA section 103(a), 42 U.S.C. 7403(a), 69 Fed. Reg. 12,151 (2004), is not only unhelpful to petitioners—because, as they concede, Pet. Br. 33, section 103(a) is a research, not a regulatory, provision—but also contrary to their argument because EPA in the cited notice *distinguishes* CO_2 from "air pollutants," 69 Fed. Reg. at 12,151 ("Emissions instrumentation will measure carbon dioxide (CO_2) *and* several air pollutants.") (emphasis added).

reading, EPA necessarily has authority under the CAA to regulate *anything* that enters the ambient air and that may result in "[a]dverse effects on public health and welfare." Pet. Br. 15. This is implausible at best. Bullets fired from a handgun enter the ambient air and indisputably are physical "substance[s]" that may endanger public health or welfare, but the Clean Air Act has never been thought to authorize EPA to impose gun controls. Contrary to petitioners' attempt to expand definitional provisions to the breaking point to create vast new regulatory programs,[19] EPA is *not* compelled to conclude that those provisions authorize regulation of anything that enters the ambient air and that may pose risks to health or welfare, irrespective of whether it, in common parlance, "pollutes" the air.

Petitioners ignore that the CAA's core provisions to which section 302(g) relates are structured to address pollution in the ambient air, not global climatological phenomena. This structure is reflected both in the text of section 302(g), which provides that an "air pollutant" is an air pollution agent that is emitted into or otherwise enters "the ambient air," and in the Act's operative regulatory provisions. Congress added the phrase "ambient air" to section 302(g) in 1977, Pub. L. No. 95-95, § 301(c), 91 Stat. 770, after EPA and this Court had defined "ambient air," respectively, as "that portion of the atmosphere, external to buildings, *to which the general public has access*," 40 C.F.R. 50.1(e) (promulgated at 36 Fed. Reg. 22,369, 22,384 (1971)) (emphasis added), and as "the statute's term for the outdoor air *used by the general public*," *Train* v. *NRDC*, 421 U.S. 60, 65 (1975) (emphasis added)—as opposed to the entirety of Earth's atmosphere. By limiting "air pollutants" to air pollution agents that enter

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[19] Cf. *Brown & Williamson*, 529 U.S. at 125-26 (Food, Drug, and Cosmetic Act definitions did not provide FDA with authority to regulate tobacco products).

the ambient air, *i.e.*, the air at or near ground level that the general public breathes, section 302(g) provides no basis to regulate substances due to their presence in the upper atmosphere—a determinative fact in the global climate change context.

Carbon dioxide, "the most pervasive of anthropogenic [greenhouse gases]," Pet. App. A73, "is fairly consistent in concentration throughout the *world's* atmosphere up to approximately the lower stratosphere," *id.* at A72 (emphasis in original). It is carbon dioxide's entry into and presence in the global atmosphere, far above the "ambient," ground-level air that people breathe, that is believed to affect global climate. See IPCC, *Climate Change: The IPCC Scientific Assessment*, at 49 (1990) ("it is the change in the radiative flux at the *tropopause* [the boundary between the troposphere and the stratosphere], and *not the surface*, that expresses the radiative forcing of [the] climate system") (first emphasis in original; second emphasis added). Petitioners do not claim that global climate change results from the presence of greenhouse gases in the ambient air. Rather, they claim it is the accumulation of these gases in the global atmosphere that causes global warming. Pet. Br. 4 (quoting NRC Report, J.A. 151). Construing the CAA to authorize regulation of substances as "air pollutants" due to their presence in the general global atmosphere is inconsistent with the Act's use of the qualifier "ambient air."

Operative provisions in the CAA addressing regulation of mobile and stationary source emissions also reflect congressional intent to limit the scope of regulatory authority over substances to address their presence in the "*ambient* air." The national ambient air quality standard program, which this Court described as the "heart" of the CAA, *Union Electric Co.* v. *EPA*, 427 U.S. 246, 249 (1976), applies to an air pollutant with respect to its "presence . . . *in the ambient*

air"—not the global atmosphere generally—as a result of mobile or stationary sources. 42 U.S.C. 7408(a)(1)(B), (2) (emphasis added); see also *id.* 7521(i)(2)(A) (directing EPA to examine the need for further motor vehicle emission reductions "to attain or maintain" national ambient air quality standards). Thus, the "criteria" on which EPA bases national ambient air quality standards are "effects . . . from the presence of [the] pollutant *in the ambient air*." *Id.* 7408(a)(2) (emphasis added); see also *id.* 7409(b)(1) (directing establishment of "primary" national ambient air quality standards). And the CAA directs EPA to set "secondary" national ambient air quality standards at the level "requisite to protect the public welfare from . . . adverse effects *associated with the presence of [the] air pollutant in the ambient air*"—not the atmosphere generally. *Id.* 7409(b)(2) (emphasis added). These provisions contradict petitioners' view that the CAA authorizes regulation of greenhouse gases due to their effects in the global atmosphere.

Finally, petitioners assert that section 302(h), *id.* 7602(h), which lists "climate" among many "effects on welfare," creates authority to regulate global climate phenomena. Pet. Br. 15. This definitional provision, however, sets out no delegation of regulatory authority at all; it merely describes kinds of effects to be considered when regulatory authority otherwise exists, and is exercised, under the CAA's operative provisions. Moreover, given section 302(g)'s limitation of "air pollutant" to "air pollution agent[s]" in the "ambient air," as discussed above, it was at the very least reasonable for EPA to conclude that the fact that the word "climate" appears in section 302(h) does not create authority to regulate motor vehicles' emissions of greenhouse gases due to effects those gases may have as a result of their presence in the global atmosphere *outside* the ambient air. *Brown & Williamson*, 529 U.S. at 132 ("The meaning—or ambiguity—of certain words

or phrases may only become evident when placed in [statutory] context.").

For all of these reasons, EPA reasonably and lawfully concluded that it lacks authority to regulate greenhouse gas emissions to address global climate change under section 202(a)(1) of the CAA. EPA's interpretation fully comports with the Act and is entitled to deference. *Chevron*, 467 U.S. at 842-45.

CONCLUSION

The Court should dismiss this case for lack of standing or, in the alternative, should affirm the court of appeals' judgment denying the petitions for review.

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